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No. 84-1443

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THOMPSON BUILDING MATERIALS INCORPORATED,
Petitioner,

v.

BOARD OF TRUSTEES OF THE WESTERN CONFERENCE OF TEAMSTERS PENSION TRUST FUND,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF AMICUS CURIAE FOR THE PENSION BENEFIT GUARANTY CORPORATION IN OPPOSITION

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IN THE

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THOMPSON BUILDING MATERIALS INCORPORATED,
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BOARD OF TRUSTEES OF THE WESTERN CONFERENCE OF TEAMSTERS PENSION TRUST FUND,
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BRIEF AMICUS CURIAE FOR THE PENSION BENEFIT GUARANTY CORPORATION IN OPPOSITION

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1. The first, second, fourth, and fifth Questions Presented by the petition for certiorari in this case are a constitutional attack on the procedures for the assessment, collection, and adjudication of withdrawal liability under the Multiemployer Pension Plan Amendments Act of 1980 (the "Multiemployer Act").[1] The appellate courts

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[1] 29 U.S.C. §§ 1381-1405, Pub. L. No. 96-364, 94 Stat. 1208-1311 (1980), *amending* the Employee Retirement Income Security Act

have unanimously decided these questions in favor of the Act's constitutionality. *The Terson Company v. Bakery Drivers and Salesmen Local 194 and Industry Fund*, 739 F.2d 118, 121 (3d Cir. 1984) (*"Terson"*); *Washington Star Company v. International Typographical Union Negotiated Pension Plan*, 729 F.2d 1502, 1511 (D.C. Cir. 1984) (*"Washington Star"*); *Textile Workers v. Standard Dye & Finishing Co.*, 725 F.2d 843, 854-55 (2d Cir. 1984), *cert. denied sub nom. Sibley, Lindsay & Curr Co. v. Bakery, Confectionery & Tobacco Workers International Union of America*, 52 U.S.L.W. 3920 (U.S. June 25, 1984) (No. 83-1646) (*"Textile Workers"*); *Peick v. Pension Benefit Guaranty Corporation*, 724 F.2d 1247, 1274-77 (7th Cir. 1983), *cert. denied*, 52 U.S.L.W. 3920 (U.S. June, 25, 1984) (No. 83-1246) (*"Peick"*); *Republic Industries, Inc. v. Teamsters Joint Council No. 83 of Virginia Pension Fund*, 718 F.2d 628, 639-43 (4th Cir. 1983), *cert. denied*, 52 U.S.L.W. 3920 (U.S. June 25, 1984) (No. 83-541) (*"Republic"*). *See also Keith Fulton & Sons, Inc. v. New England Teamsters and Trucking Industry Pension Fund*, No. 83-1804, 5 Employee Benefits Cases (BNA) ("EBC") 1761, 1768, 1770-72 (1st Cir. Aug. 6, 1984), *vacated in part and rehearing granted*, Order of October 22, 1984 (Appendix to this Brief ("App.") 1a) (*"Keith Fulton"*), and paragraph 3, *infra*.

2. The third Question Presented seeks an exception to the imposition of withdrawal liability triggered by a withdrawal from a multiemployer pension plan that is

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of 1974 ("ERISA"), Pub. L. No. 93-406, 88 Stat. 829-1035 (1974), 29 U.S.C. §§ 1301-1481 (1982).

Rule 36.4 of the Rules of this Court authorizes the filing of a brief *amicus curiae*, without the consent of the parties, by "any agency of the United States authorized by law to appear in its own behalf." The Pension Benefit Guaranty Corporation has such legal authority pursuant to 29 U.S.C. § 1302(b)(1) (1982).

purportedly involuntary and union-mandated. This case presents no such issue. By failing to participate in the mandatory arbitration proceeding for resolving disputes under the Multiemployer Act, 29 U.S.C. § 1401(a), petitioner waived its opportunity to develop any factual record that might justify a conclusion that this case actually involves an involuntary withdrawal.[2] In any event, Congress considered the problem of "union-mandated" withdrawals, but decided to reserve a legislative solution pending further study.[3] The court below properly concluded that Congress' deferral of any such exception as that proposed by petitioner "indicates that Congress intended withdrawal liability to attach in the interim." Slip op. at 21 (Appendix to Petition for Writ of Certiorari 48).

3. The sixth Question Presented suggests that certiorari should be granted to resolve a "conflict in principle" among the circuits. Petitioner relies on the decision of a panel of the First Circuit in *Keith Fulton*, holding unconstitutional the presumptions of 29 U.S.C. § 1401(a)(3). 5 EBC at 1768-70. However, the *Keith Fulton* opin-

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[2] Indeed, petitioner argued in the court below that it had withdrawn pursuant to a binding agreement with the union entered on September 26, 1980, and hence that it owed no withdrawal liability. Notice of Motion and Motion to Remand at 4-5 (App. 6a-7a). See Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 558(d), 98 Stat. 494, 899 (1984) (App. 10a).

[3] SEC. 412. STUDIES BY PENSION BENEFIT GUARANTY CORPORATION AND SECRETARY OF LABOR.

(a)(1) The Pension Benefit Guaranty Corporation shall conduct a separate study with respect to—

. . .

(B) the necessity of adopting special rules in cases of union-mandated withdrawal from multiemployer pension plans.

(2) The Corporation shall report to the Congress the results of the studies conducted under paragraph (1), including its recommendations with respect thereto.

Multiemployer Act, Pub. L. No. 96-364, 94 Stat. 1309, 29 U.S.C. § 1306 note (1982).

ion on this question has been vacated and withdrawn pending a decision on rehearing. Order of October 22, 1984 (App. 1a). As a result, no conflict exists among the circuits as to any of the Questions Presented by petitioner.

4. For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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March 21, 1983

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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 83-1804

KEITH FULTON & SONS, INC.,
Plaintiff, Appellant,

v.

NEW ENGLAND TEAMSTERS AND TRUCKING INDUSTRY PENSION FUND, ET AL.,
Defendants, Appellees.

Before
Campbell, *Chief Judge,*
Coffin, Bownes and Breyer, *Circuit Judges*

ORDER

Entered October 22, 1984

Appellees' petition for rehearing en banc and the suggestion for reahearing en banc filed by intervenor Pension Benefit Guaranty Corporation are allowed. Since rehearing is requested, and is allowed, only with respect to the issue of the constitutionality of 29 U.S.C. § 1401 (a)(3), the panel's judgment is vacated only with respect to that issue.

Argument will be heard during the December 1984 session. The case will stand on the briefs and memoranda filed to date (including the submissions of the Pension Benefit Guaranty Corporation), except that the appellant, the appellees and the intervenor may each file

a supplemental brief not to exceed 20 pages not later than November 19, 1984. Counsel for the Pension Benefit Guaranty Corporation may participate in oral argument, but if so, appellees' time will be correspondingly reduced so that the time available to appellant will be equal to that of both appellees and intervenor.

By the Court,

FRANCIS P. SCIGLIANO
Clerk

[1]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-5893

BOARD OF TRUSTEES OF THE WESTERN CONFERENCE OF TEAMSTERS PENSION TRUST FUND,
Plaintiff-Appellee,

vs.

THOMPSON BUILDING MATERIALS, INCORPORATED,
a California corporation,
Defendant-Appellant.

Appeal from the United States District Court
for the Central District of California

NOTICE OF MOTION AND MOTION TO REMAND; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF; DECLARATION OF HERBERT A. MOSS

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-5893

BOARD OF TRUSTEES OF THE WESTERN CONFERENCE OF TEAMSTERS PENSION TRUST FUND,
Plaintiff-Appellee,

vs.

THOMPSON BUILDING MATERIALS, INCORPORATED,
a California corporation,
Defendant-Appellant.

NOTICE OF MOTION AND MOTION TO REMAND; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF; DECLARATION OF HERBERT A. MOSS

TO: PLAINTIFF-APPELLEE, BOARD OF TRUSTEES OF THE WESTERN CONFERENCE OF TEAMSTERS PENSION TRUST FUND AND TO ITS ATTORNEYS OF RECORD HEREIN:

PLEASE TAKE NOTICE that defendant-appellant THOMPSON BUILDING MATERIALS, INC., shall

move this court to remand the above-entitled case to the District Court for the Central District of California.

This motion shall be based on Fed.R.App.P. 27(9) [sic], the foregoing notice, the within points and authorities, the pleadings, records and files in this action, and the declaration of Herbert [?] A. Moss. The ground for this motion is to allow a reassessment in light of a change of law, as set forth more fully below.

DATED: September 28, 1984

LAW OFFICES OF
ROGER A. SAEVIG

By: /s/ Roger A. Saevig
ROGER A. SAEVIG

Attorneys for Defendant-Appellant
THOMPSON BUILDING MATERIALS, INC.

[4]

POINTS AND AUTHORITIES

I

A FEDERAL APPELLATE COURT MAY REMAND A CASE TO FEDERAL DISTRICT COURT FOR RECONSIDERATION IN LIGHT OF INTERVENING AMENDMENT TO A FEDERAL STATUTE.

The authority of appellate courts to remand a case to a district court for reconsideration of changes in the law is well established by case law. *Soric vs. Immigration & Naturalization Service* (1965) 382 US 285, 86 S.Ct. 432, 15 L.Ed 2d 330.

This case concerns defendant-appellant's liability under 29 U.S.C. § 1381, *et seq.* (hereinafter referred to as the MPPAA). The Deficit Reduction Act of 1984 § 558 intervenes and modifies liability under the MPPAA specifically § 558(D) [sic] states that "In the case of an employer who, on September 26, 1980, has a binding agreement to withdraw from a multiemployer plan, subsection a(1) shall be applied by substituting "December 31, 1980 for September 26, 1980." Section a(1) states that any withdrawal liability incurred by an employer pursuant to part 1 of subtitle E of Title IV of the Employee Retirement Security Act of 1974 (29 U.S.C. § 1381, *et seq.*) as a result of the complete or partial withdrawal of such employer from a multiemployer plan before September 26, 1980, shall be void. Deficit Reduction Act of 1984, (1984) CCH Standard Tax Reports No. 27, June 26, 1984.

Defendant-Appellant contends that the actions between them and Teamsters Local 952 on September 26, 1980, resulted in a binding agreement to withdraw from a multiemployer plan, within the meaning of § 558 of the Deficit Reduction Act of 1984.

[5]

Plaintiff-Appellee has unilaterally determined that THOMPSON BUILDING MATERIALS, INC. withdrew from the plan on October 1, 1980, just five (5) days later than the all important September 26th date. A true and correct copy of a letter fixing the withdrawal date of October 1, 1980 is included herein as Exhibit "A" and is incorporated herein by reference as if set forth in full.

Accordingly, the Appellate Court should remand this case to the District Court for the Central District of California with directions to consider defendant-appellant's liability under 29 U.S.C. § 1381 *et seq.* as amended by the Deficit Reduction Act of 1984.

II

A FEDERAL COURT MAY REMAND A CASE TO FEDERAL DISTRICT COURT FOR FINDINGS OF FACT.

An appellate court may remand a case to the District Court if no findings of fact were made. *Panama Mail S.S. Co. vs. Vargas* (1930) 28 US 670, 50 S.Ct. 448, 74 L.Ed 1105.

In this case, no findings were made as to the applicability of § 558 of the Deficit Reduction Act of 1984 by the court below. Specifically, there is little or no factual record indicating whether defendant-appellant had on September 26, 1980, a binding agreement to withdraw from the multiemployer pension plan, within the meaning of the new law.

Defendant-appellant contends that the actions of the respective parties on or before September 26, 1980 resulted in a Binding Agreement to withdraw from the multiemployer plan on [6] September 26, 1980. Accordingly, the absence of sufficient facts require that the case be remanded to Federal District Court for the Central Dis-

trict Court of California for findings of fact relevant to the application of § 558 of the Deficit Reduction Act of 1984 to this case, in order to properly determine defendant-appellant's liability under 29 U.S.C. § 1381 *et seq.*

CONCLUSION

For the foregoing reasons, the motion to remand to the Federal District Court for the Central District of California should be granted.

DATED: September 28, 1984

LAW OFFICES OF
ROGER A. SAEVIG

By: /s/ Roger A. Saevig
ROGER A. SAEVIG

Attorneys for Defendant-Appellant
THOMPSON BUILDING MATERIALS, INC.

DECLARATION OF HERBERT A. MOSS

I, HERBERT A. MOSS, declare as follows:

1. I was the labor relations attorney for Defendant-Appellant THOMPSON BUILDING MATERIALS, INC., in 1980 and have personal knowledge of the matters set forth in this declaration.

2. I make this declaration in support of the motion to remand the above-entitled action to the District Court.

3. On or about September 1980, I conducted negotiations with Teamsters Local 952 for the purpose of arriving at a new Collective Bargaining Agreement.

4. On September 26, 1980, a legal impasse resulted. Once the impasse was reached on said date, I told the union negotiators that certain unilateral changes would be instituted one of which was the complete and permanent cessation of future contributions into the Pension Trust Fund.

5. As a direct result of the events of September 26, 1980, defendant-appellant ultimately became liable under the Multi-employer Pension Plan Amendments Act of 1980, 19 [sic] U.S.C. § 1381, *et seq.*

I declare under penalty of perjury that the above is true and correct to the best of my knowledge.

Executed this 1st day of October, 1984, at Santa Ana, California.

/s/ Herbert A. Moss
HERBERT A. MOSS

PUBLIC LAW 98-369 [98 Stat. 494, 899]; July 18, 1984
DEFICIT REDUCTION ACT OF 1984

An Act to provide for tax reform, and for deficit reduction.

Be it enacted by the Senate and House of Representatives of the United States in Congress Assembled,

* * * *

SEC. 558. ELIMINATION OF RETROACTIVE APPLICATION OF AMENDMENTS MADE BY MULTIEMPLOYER PENSION PLAN AMENDMENTS ACT OF 1980.

(a) IN GENERAL.—

(1) LIABILITY.—Any withdrawal liability incurred by an employer pursuant to part 1 of subtitle E of title IV of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1381 et seq.) as a result of the complete or partial withdrawal of such employer from a multiemployer plan before September 26, 1980, shall be void.

* * * *

(d) SPECIAL RULE FOR CERTAIN BINDING AGREEMENTS.—In the case of an employer who, on September 26, 1980, has a binding agreement to withdraw from a multiemployer plan, subsection (a)(1) shall be applied by substituting "December 31, 1980" for "September 26, 1980".